FOR ARGUMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-602

DONALD W. AND BONNIE G. AGINS,
Appellants,

v.

CITY OF TIBURON,
Appellee.

On Appeal From the Supreme Court
of the State of California

BRIEF OF THE CONSERVATION FOUNDATION, ENVIRONMENTAL DEFENSE FUND, NATIONAL AUDUBON SOCIETY, NATIONAL CENTER FOR PRESERVATION LAW, NATIONAL CONFERENCE OF STATE HISTORIC PRESERVATION OFFICERS, NATIONAL PARKS AND CONSERVATION ASSOCIATION, NATIONAL TRUST FOR HISTORIC PRESERVATION, NATIONAL WILDLIFE FEDERATION, PRESERVATION ACTION, AND SIERRA CLUB AS AMICI CURIAE IN SUPPORT OF APPELLEE

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INTEREST OF AMICI

Pursuant to Supreme Court Rule 42(2), the above listed organizations file this brief as Amici Curiae in support of Appellee. Counsel for the parties have con-

sented to the filing of this brief, and letters of consent have been filed with the Clerk.

Amici are national organizations concerned with the protection and promotion of the natural and built environment. Amici have a combined U.S. membership which exceeds three million. All Amici have a major interest in the encouragement of environmentally and economically sound land use regulation and policy at all levels of government and are seriously concerned by the implications for environmental, preservation and land use regulations unless this Court sustains the decision below. A more detailed description of each Amicus appears in Appendix A to this brief.

QUESTIONS PRESENTED

1. Whether, where the California Supreme Court, in accordance with long-established, independently-grounded state rules of practice and procedure, took judicial notice of the City of Tiburon's ordinances and actions, and based upon that judicial notice concluded that Appellants' creditable allegations would not, if true, establish that the zoning ordinance was unconstitutionally overburdensome since Appellants retained reasonable use of their property, the court was obligated nonetheless to order a trial of Appellants' claims?[1]

2. Whether, when a regulatory ordinance not intended to condemn property is found to burden property unconstitutionally, state courts must award damages or whether they instead may award appropriate

[1] As discussed below, Amici believe that the California Supreme Court's disposition of this issue was plainly correct. Accordingly, Amici believe that the second question need not be reached in resolving the present case.

declaratory or injunctive relief to insure that the property involved is not impermissibly burdened?

STATEMENT OF THE CASE

Appellants' presentation of the case, which makes claims of unconstitutional burdening based upon their allegations, ignores the factual context of the case. Because, as discussed below, the California courts, acting in accordance with long-standing state procedural rules, took judicial "notice of the zoning ordinances and actions of the city," *Agins* v. *City of Tiburon,* 145 Cal. Rptr. 476, 477 (Cal. App. 1978), and limited Appellants' allegations in accordance with the judicially noticed facts, Amici believe it is important that the Court understand the context in which the Agins' case was considered by the California courts.

1. *The Agins' Property.* In October 1968, Appellants Dr. Donald W. and Bonnie G. Agins ("Agins") purchased the five-acre parcel involved in this litigation. The public record documents show that the Agins paid a total price of $50,000 for the property.[2] At the time the Agins purchased the property, it was zoned by the City of Tiburon—under the ordinance which preceded the ordinance challenged here—as "RO-1—residential, open zone (one acre)." City of Tiburon Ordinance No. 9 N.S., Section 10-3.[3] The RO-1 zoning permitted

[2] The Agins' deed, a copy of which is Appendix B to this brief, shows recording taxes of $55. Under California law, recording taxes must be paid at a rate of $.55 per $500 of value. Cal. Rev. & Tax. Code §§ 11911 *et seq.* Thus, the deed upon its face showed a purchase price of $50,000. *See* Federal Rules of Evidence, Rule 201; Cal. Evidence Code §§ 450-59.

[3] Relevant portions of the text of this ordinance are reprinted as Appendix C to this brief.

the Agins to construct a maximum of five residential single family units on their five acre property, provided they complied with certain other regulations.[4] The Agins took no action to develop their property.

2. *The California Open Space Enabling Legislation.* In the 1950s and early 1960s, California, which was strongly growth oriented and placed very few restrictions on land developers, experienced substantial population influx and, as a result, tremendous development pressures. Developers built subdivisions on mountains, in canyons and dry river beds, and at other unsuitable localities. The environmental qualities which had originally attracted people to California suffered dramatically. Major disasters requiring substantial federal and state emergency aid occurred in urban and suburban residential areas as homes were washed away and people killed by floods and landslides.[5] In brief,

[4] In order to construct the residential units which the zoning then permitted, the Agins were required to subdivide the property in accordance with local regulations and, after 1970, were further required to comply with the California Environmental Quality Act of 1970, Cal. Pub. Resources Code §§ 21000 *et seq.* The Agins do not allege, and the record does not show, that they ever made any attempt to comply with these state and local regulations.

[5] Accounts of the most recent such events, which took place less than a month ago in southern California, are contained in, *e.g.*, *Newsweek*, "A Plague of Rain and Mud," March 3, 1980, p. 33 ("Even before the storms subsided, critics began blaming Los Angeles public officials for allowing developers to build homes in the disaster-prone canyons and hills."); *Los Angeles Times*, Feb. 16, 1980, p. 1; *Los Angeles Times*, Feb. 18, 1980, pp. 1, 3; *Los Angeles Times*, Feb. 19, 1980, pp. 3, 16. Interestingly, as a result of these events, some of the California attorneys who have filed a brief in this litigation on their own behalf (*see* brief of Messrs. Goldstein, Fadem, *et al.*, in support of Appellants) reportedly announced that they were considering "inverse condemnation" suits against the City of Los Angeles and other area

in the space of two decades, California became the nation's most urbanized state, and the unplanned California urban sprawl led to serious concern on the part of citizens and state and local agencies. *See, e.g., Selby Realty Co.* v. *City of San Buenaventura,* 10 Cal. 3d 110, 120, 109 Cal. Rptr. 799, 805, 514 P.2d 111, 117 (1973).[6]

In the mid-1960s and early 1970s the California state legislature responded to development pressures by establishing a number of land use planning mechanisms. Among these was open space legislation. In 1966, the

governments for failing to properly control development of hillsides and other areas subject to mudslides, slippage, flooding, etc. *National Law Journal,* March 10, 1980, pp. 3, 18.

An excellent, if unintentional, description of the pressures which in the absence of land use planning can lead to the types of environmental disasters reported in the foregoing articles is contained in the brief amicus curiae in this case filed by Half Moon Bay Properties, Inc. ("HMBPI"), at 3-5. HMBPI there contends that because it has acquired undeveloped hillside and mountain property it must now be allowed to build thousands of residences on the property without regard to the planning authorities' judgment as to the property's unsuitability for urban development.

[6] See also Population Research Unit, California Department of Finance, Net Civilian Migration (1979). Much of the development pressure in California has been concentrated in its coastal areas. One-third of the land in the California coastal counties is publicly owned and uninhabited, yet 65 percent of the State's more than 20 million people reside in these 15 counties. Research Department, Security Pacific Bank, California Coastal Zone Economic Study: Profile 2-1, 3-1 (April, 1975). Indeed, the development pressure on the San Francisco Bay area, where Tiburon is located, was so great that by 1959 filling, development and pollution had reduced the Bay's water surface from 680 to 400 square miles. R. G. Healy (ed.), Protecting the Golden Shore 7 (1978); see also, R. Odell, The Saving of San Francisco Bay: A Report on Citizen Action and Regional Planning (1972).

California legislature enacted statutes authorizing counties and cities to acquire, by purchase or gift, "open spaces and areas," and authorized the use of eminent domain for these purposes. Cal. Gov. Code §§ 6950-54. In 1971, the legislature extended its open space legislation by requiring all California cities and counties to adopt open space plans and to enact "open-space zoning ordinance[s]" consistent with these plans. Cal. Gov. Code §§ 65563, 65566, 65567, 65910.[7]

Thus, the California legislature, in enacting its open space planning laws, placed two quite different mechanisms at the disposal of California's cities and counties. First, it *authorized*—but did not require—cities and counties to acquire "open space" properties by the use of public funds, whether through the use of eminent domain or by negotiation. Second, the legislature *required* cities and counties to adopt open space zoning ordinances through the use of their regulatory powers. It was the specific intention of the California legislature that cities and counties use their regulatory open space zoning powers in a manner which would not unreasonably burden privately-owned properties:

> "The legislature hereby finds and declares that this article is not intended, and shall not be construed, as authorizing the city or the county to exercise its power to adopt, amend or repeal an open-space zoning ordinance in a manner which will take or damage private property for public use without the payment of just compensation therefor." Cal. Gov. Code § 65912.[8]

[7] These sections are reprinted in Appendix F to the Jurisdictional Statement at 47-48, 52. The California statutes required each city and county to adopt an interim open space plan not later than August 31, 1972 and a permanent open space plan not later than December 31, 1973. Cal. Gov. Code § 65563. *See* Appendix F at 51.

Appendices to the Jurisdictional Statement are cited hereafter by letter. Other abbreviations used are "Br." for Appellants' Brief and "J.A." for the Joint Appendix.

3. *Tiburon's Open Space Planning.* Pursuant to the mandate of the California legislature, beginning in January 1972, the City of Tiburon hired financial and planning consultants to advise it in the creation of an open space plan and with respect to obtaining financing for any properties to be acquired. The recommendations of the open space planning consultants and the financial consultants, taken jointly, were that the city should issue bonds in the amount of $1.25 million to purchase approximately thirty acres of then undeveloped land in the City of Tiburon, including the Agins' parcel, and adopt open space zoning which would take account of environmental factors in future development. *See* California Municipal Finance, City of Tiburon, Open Space Acquisition Financing (July, 1972) and Tiburon, Open Space Element Text (March, 1973). The City of Tiburon did ultimately issue bonds as suggested by its financial consultants, and in the period 1973 through 1977 acquired by negotiated purchase a number of properties.[9] It did not, however,

[8] Appendix F at 53.

[9] Among the properties purchased by the City since its dispute with the Agins started are three parcels on the same ridge where the Agins' property is located. In 1973, the City purchased the 25 acre Eavey property for $232,000. Tiburon City Council Minutes No. 329 (September 12, 1973). In 1975, the City purchased slightly under 13 acres of property from the School District for $175,000. Tiburon City Council Minutes No. 387 (July 28, 1975). And in 1977, the City purchased the ten acre Hamon property for $200,000. Tiburon City Council Minutes No. 447 (August 8, 1977). Based upon these purchases, it appears that the value of the

follow the financial consultants' recommendations and it never purchased any of the property that the financial consultants considered. *See Agins* v. *City of Tiburon, supra,* 145 Cal. Rptr. at 482 n.2.

On June 28, 1973, the City of Tiburon enacted Ordinance 124 N.S., which is the subject of this litigation. Ordinance 124 N.S. ("the open space zoning ordinance") rezoned the Agins' (and other) property from RO-1 to RPD-1.[10] Prior to the change, as discussed above, the zoning law permitted the Agins to build one house per acre, or a maximum of five on their property. Under the new zoning ordinance, the Agins are permitted to build not less than one nor more than five residences on their property, as determined by the City Planning Commission and City Council upon the owner's request and based upon standards set forth in the ordinance.[11] The Agins do not allege, and there is nothing in the record to suggest, that they ever made a request to the City authorities that any residential construction be permitted on their property.

4. *The Agins/Tiburon condemnation dispute.* On October 15, 1973, the Agins filed a claim with the City of Tiburon alleging that the rezoning of the Agins' property by Ordinance 124 N.S. and that the reference to the property in that zoning as "open space" prevented any sale of the property and so burdened the

Agins' property at the time they brought the present lawsuit was probably between $50,000 and $100,000. The Agins' claim, of course, is for $2 million.

[10] Appendix E at 41-46.

[11] Appendix D at 30-33. In addition, as under the old zoning ordinance, prior to construction of any residences on their property, the Agins are required to comply with the applicable subdivision and environmental provisions.

property as to constitute a "taking" of the property without just compensation.[12] The City denied the Agins' claim, but on December 4, 1973, instituted an eminent domain proceeding against the Agins. Approximately a year later the City abandoned its effort to acquire the Agins' property.[13] In accordance with California law, Tiburon was permitted to drop its condemnation suit upon the payment of the Agins' expenses.[14] The City paid the Agins $4,500 in costs and the proceeding was abandoned.[15]

5. *The Present Lawsuit.* The Agins filed the present lawsuit on June 4, 1975, making essentially the following allegations.

First, in Count I, the Agins pled what their counsel apparently intended as a claim for damages allegedly resulting from impermissible interference with use of their property by the rezoning. They have referred to their action as one for "inverse condemnation."[16]

[12] Paragraph V of the Agins' complaint (J.A. 7) alleges that they filed this claim on October 15, 1972. However, the claim itself, a copy of which is attached as Exhibit B to the Joint Appendix (J.A. 21-23), is dated September 20, 1973, and refers to events of June, 1973. The California Court of Appeal found that the reference in Appellants' complaint to "October 15, 1972" was erroneous. *See Agins* v. *City of Tiburon, supra,* 145 Cal. Rptr. at 477 n.1.

[13] Complaint paragraphs XVII-XXV (J.A. 9-10).

[14] *See* Cal. Civ. Proc. Code § 1255(a); *County of Los Angeles* v. *Hale,* 165 Cal. App. 2d 22, 331 P.2d 166 (1958).

[15] *City of Tiburon* v. *Agins,* No. 69070 (Marin County Superior Court, May 20, 1975).

[16] This Court has recently recognized that the term "inverse condemnation" is simply a shorthand description for a money damage remedy to recover the value of property in circumstances which are the " 'inverse' or 'reverse' of a condemnation proceed-

Thus, in Count I the Agins' major factual allegations were that

> —the financial and planning consultants' reports, which had recommended the acquisition of certain property, including the Agins', to be maintained as permanent open space, had been fully incorporated by the open space zoning ordinance and that the ordinance was "limited in every respect to the terms . . . and completely restricted to the mandate" set forth in those reports; [17]
>
> —the city's then-abandoned attempt to condemn the Agins' property, as previously described, together with the "publication" of the city's activities, was intended to and did destroy the usefulness of the Agins' property; [18] and
>
> —the result of the adoption of Ordinance 124 N.S. was to "forever prevent the development, for residential use or otherwise" and "to prevent any sale, use, transfer or development" of the Agins' property.[19]

As a result, the Agins sought "compensation" or "damages" in the amount of $2 million.

In Count II, the Agins alleged essentially the same facts and claimed that the open space zoning ordinance was null and void and unconstitutional for a variety

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ing"—that is, where instead of exercising its condemnation powers, a government physically seizes or occupies property, leaving it to the landowner to initiate proceedings. *United States* v. *Clarke*, 48 U.S.L.W. 4258, 4259 (March 18, 1980). As discussed below, this Court has not characterized a claim for damages resulting from supposedly burdensome regulations as "inverse condemnation."

[17] Complaint, paragraphs V-VIII (J.A. 5-7).

[18] Complaint, paragraphs XII-XXVII (J.A. 7-11).

[19] Complaint, paragraphs IV, IX (J.A. 5, 7).

of reasons. Among the reasons asserted were that the ordinance allegedly deprived the Agins of their property without compensation.[20] As a remedy for their claims in Count II, the Agins sought to have the zoning ordinance declared void as applied to their property and to have injunctive relief provided against its enforcement.

The City of Tiburon filed a demurrer to the complaint. A demurrer under California practice is similar, but not identical to, a motion to dismiss under Rule 12 of the Federal Rules of Civil Procedure. Under the California demurrer practice, a court must accept specific factual allegations as true unless they are contradicted by laws, ordinances, public documents or other items as to which the court must take judicial notice. In addition, conclusory allegations, legal or factual, are not binding. *See, e.g., Dale* v. *City of Mountain View,* 55 Cal. App. 3d 101, 105, 127 Cal. Rptr. 520, 522 (1976); Cal. Evidence Code §§ 452-53.

The trial judge granted the demurrer to both counts. With respect to the "inverse condemnation" count, the dismissal was without leave to amend. Under California practice, this meant that in the opinion of the trial judge the Agins could not state a cognizable claim for compensation—in other words, the trial court implicitly held that damages were not available as a remedy under the general circumstances alleged. 3 B.E. Witkin, *California Procedure: Pleading,* § 847 at 2451 (2d

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[20] Complaint, paragraph II (J.A. 11-13). The Agins' complaint also alleged, *inter alia,* that the open space zoning was not in conformity with the state open space requirements, was not pursuant to a valid open space plan, and was unrelated to proper police power objectives. The California Court of Appeal rejected all of these claims and the Agins did not pursue them further. *See Agins* v. *City of Tiburon, supra,* 145 Cal. Rptr. at 478-79.

ed. 1971). The trial judge dismissed the count for declaratory and injunctive relief with leave to amend. In California practice, this meant that the trial judge considered that the Agins had not set forth creditable facts sufficient, if true, to establish a "taking" for which invalidation of the open space ordinance would be required, but that such a remedy would be available if appropriate facts were alleged. 3 B.E. Witkin, *California Procedure: Pleading,* § 845 at 2450 (2d ed. 1971). Accordingly, the dismissal with leave to amend was designed to allow the Agins to plead additional facts, if such existed.[21] However, the Agins declined to amend their complaint and appeals followed, first to the California Court of Appeal and then to the California Supreme Court. The Supreme Court affirmed the trial judge's actions.

The decisions of the three lower courts have resolved a number of factual issues, as follows:

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[21] The City's demurrer also specifically raised lack of jurisdiction as an additional ground for dismissal. (J.A. 25). Under long established California law, a failure to exhaust administrative remedies in a zoning case is jurisdictional. Thus, California courts have held that exhaustion of administrative remedies must be specifically alleged. *Metcalf* v. *County of Los Angeles,* 24 Cal.2d 267, 269, 148 P.2d 645, 646 (1944); *Pan Pacific Properties, Inc.* v. *County of Santa Cruz,* 81 Cal. App. 3d 244, 248-52, 146 Cal. Rptr. 428, 431-33 (1978). The Agins had not exhausted their administrative remedies and did not so allege. As a result, the trial judge apparently sustained the demurrer on this ground as well. However, the California Court of Appeal, as noted below (*see* p. 13, n.24, *infra*) misread the Tiburon ordinance, incorrectly assumed that a variance was necessary for the Agins to build more than one residence, and declined to require them to seek a variance. The California Supreme Court corrected the Court of Appeal's erroneous reading of the zoning ordinance, but did not consider the jurisdictional issue.

(a) In accordance with California practice, the courts below took judicial notice of the Tiburon financial and planning reports and of the open space zoning ordinance. The California Court of Appeal held—and the Agins did not challenge in the California Supreme Court—that neither those plans nor the zoning ordinance required the City of Tiburon to purchase the Agins' property. 145 Cal. Rptr. at 478 n.2.[22]

(b) The California Supreme Court held that the so-called precondemnation activities described at pages 7-9, *supra,* including the abandoned condemnation suit by the City of Tiburon, were in accordance with the procedure established under the California statutes and did not constitute inpermissible interference with the Agins' property. (App. A at 14).[23]

(c) The California Supreme Court, again following California practice, took judicial notice of the fact that the Tiburon open space zoning ordinance allows the construction of between one and five residential units on the Agins' property.[24] (App. A at 13). Accordingly, the court held that on demurrer the Agins'

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[22] Appellants attempt to resurrect a variation of this unfounded factual claim by insisting that the City of Tiburon, when it adopted its open space plan, "determined that it must acquire the subject property . . . ." (Br. at 21, n.7). As the California Court of Appeal held, the city made no such finding.

[23] *Compare Brault* v. *Town of Milton,* 527 F.2d 730 (2d Cir. 1975) (en banc) (use of judicial processes in accordance with state law not a "taking" at least in absence of allegations of bad faith or sham).

[24] The California Court of Appeal apparently misread the zoning ordinance as limiting the development to one residence per five acres. 145 Cal. Rptr. at 481.

allegation that the ordinance "forever prevented" the development of the Agins' property for "residential or any other use" could not be credited.[25] Instead, for purposes of the demurrer, the Court held that the Agins' complaint must be treated as alleging that the City of Tiburon zoning ordinance authorized the construction of not less than one nor more than five residential units. The question was whether such an allegation would, if true, demonstrate that the zoning regulation was unconstitutional. (App. A at 13.)

This, then, is the factual posture of the case as it was before the California Supreme Court and, accordingly, as it is before this Court. In the circumstances of the case the California Supreme Court quite properly held that the Agins had not alleged creditable facts, which, if true, would show an unconstitutional burdening of the property. Although unnecessary to the disposition of the case, the California Supreme Court also stated that in the general circumstances of this case no damage remedy was available. This appeal followed.

SUMMARY OF ARGUMENT

1. *The California Supreme Court was plainly correct in dismissing the Agins' "taking" claim.* The facts

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[25] It is noteworthy that the Appellants did not make any specific allegations in this respect—for example, they did not allege that they had attempted to sell the property but could not, or that they had attempted to obtain building permits but could not. The California courts thus held that extremely general and conclusory allegations could not survive a demurrer where the applicable ordinance on its face was contrary to the allegations. In this respect, the California practice is generally similar to the rule of *Pacific States Box and Basket Co.* v. *White*, 296 U.S. 176 (1935), cited by this Court in *Lake Country Estates, Inc* .v. *Tahoe Regional Planning Agency*, 99 S. Ct. 1171, 1175 (1979).

of the Agins' case, which have been discussed in detail previously, are simple but important to the California Supreme Court's disposition of the case. The Agins bought the five acre property involved in this litigation in 1968 for $50,000. At the time of the purchase, and for some time previously, the property was zoned to allow a maximum of five single family residential units. After the State of California passed legislation requiring cities to enact open space zoning, the City of Tiburon modified its zoning to provide for a maximum of five and a minimum of one residential unit on the Agins' property. Thus, it is not clear that the rezoning has made any change at all in the permitted use of the Agins' property, and the Agins have not alleged otherwise. Indeed, the Agins never bothered to request permits to construct any residences on their property, not before the zoning change and not after. Instead, the Agins filed a lawsuit claiming that the open space zoning had deprived their property of "any purpose or use whatsoever" and sought an injunction and damages in the amount of $2 million, forty times what they had paid for the property seven years earlier.

The California Supreme Court examined the Agins' factual allegations in light of its judicial notice of Tiburon's "ordinance and actions" pursuant to the California procedure described at pages 11-14, *supra*. The court then held that the allegations as credited would not, if proven, show that the Agins were deprived of all reasonable use of their property and hence would not demonstrate an unconstitutional "taking." Accordingly, the court sustained the City of Tiburon's demurrer to the complaint. (App. A at 13.) The decision by the California court was without a doubt correct under this Court's precedents.

First, this Court has repeatedly held in police power regulation cases where no physical instrusion is involved that an unconstitutional burdening of property does not occur so long as the owner retains some reasonable use of the property. *E.g., Andrus* v. *Allard,* 100 S. Ct. 318 (1979); *City of Eastlake* v. *Forest City Enterprises, Inc.,* 426 U.S. 668, 674 n.8 (1976); *Hadacheck* v. *Sebastian,* 239 U.S. 394 (1915). This is precisely the test used by the California Supreme Court.

Second, applying the specific tests set forth in *Penn Central Transportation Co.* v. *City of New York,* 438 U.S. 104, 124-28 (1978), makes this point perfectly clear. Since there was not necessarily any change in the number of units allowable on the Agins' property, there was no significant economic impact and perhaps no interference with the owner's investment-backed expectations at all. The type of zoning ordinance involved here—a single family, one to five acre limitation—has been recognized as a reasonable police power objective in virtually every case to consider the matter, including the present case. And this is clearly not an instance of government action which could be characterized as an acquisition. The City did not make the Agins' property a park, nor require public access. This is a garden-variety zoning regulation and nothing more.

The Agins insist that having alleged an unconstitutional burdening of their property, which they say is a highly factual matter, they were entitled to a trial. But while many types of cases—including those in which a regulatory burden is claimed to be unconstitutional, *see Penn Central, supra,* 438 U.S. at 124—may often turn on factual questions, there can be no doubt

that disposal of such cases on motions to dismiss, summary judgment, and the like can be appropriate. *E.g., First National Bank* v. *Cities Service Co.,* 391 U.S. 253, 284-289 (1968). It is hard to imagine a case with less merit than this one—as noted, the Agins could not even allege that the new zoning had any greater impact than the old, and the ordinance on its face allowed up to five residential units. Under these circumstances, the California Court was plainly correct in its holding. Indeed, with the factual context understood, Amici submit that this case does not raise a substantial federal question.

2. *There is no damage remedy available in this case.* In view of its holding on the "taking" claim, the discussion of the California Supreme Court regarding damages, although well reasoned and Amici believe correct, may be characterized as dicta. Since it is plain that the Agins have failed to state a claim of a "taking" and accordingly no relief is appropriate, there is no need to consider the issue. However, in the event that the Court does reach this issue, Amici submit that the decision of the California Supreme Court should be affirmed, for a number of important reasons.

First, there is no precedent for an "inverse condemnation" remedy in the context of an overly burdensome regulatory scheme.

(a) In no case has this Court ever upheld an award of damages on the theory of "inverse condemnation." Instead, the uniform result has been to tell the agency involved it could not proceed unless it paid compensation. *E.g., Kaiser Aetna* v. *United States,* 100 S. Ct. 383 (1979) (regulation found to be "taking" and enforcement of Corps of Engineers order denied); *Penn-*

sylvania Coal Co. v. *Mahon,* 260 U.S. 393 (1922) (regulation found unconstitutional and enforcement enjoined). The supposedly contrary cases cited by the Appellants uniformly hold that where the United States intends to carry out a program and the Tucker Act is available for a damage remedy an injunction will not issue. These cases thus support the judicial deference argument made below, but surely do not suggest that damage remedies are appropriate against the legislative will.

(b) Virtually all the other states which have specifically considered this issue have concluded, as has California, that in circumstances similar to those here no "inverse condemnation" damage remedy is available for an unconstitutionally burdensome regulation. Thus, far from being an aberration as Appellants imply, the *Agins* decision is fully consistent with the position of the highest courts in most states. *See, e.g., Eck* v. *City of Bismark,* 283 N.W.2d 193, 200 (N.D. 1979); *Holaway* v. *City of Pipestone,* 269 N.W.2d 28 (Minn. 1978); *Fred F. French Investment Co.* v. *City of New York,* 39 N.Y.2d 587, 385 N.Y.S.2d 5, 350 N.E.2d 381, *appeal dismissed,* 429 U.S. 990 (1976).

(c) *Bivens* v. *Six Unknown Named Agents,* 403 U.S. 388 (1971), and *Davis* v. *Passman,* 99 S. Ct. 2264 (1979), do not support a constitutional damage remedy here. Those cases indicate that a constitutional damage remedy may be implied where injunctive relief would be futile and no statutory remedies exist. In the present case, however, injunctive relief is entirely adequate. Since the gist of the complaint is failure to allow development, an order striking down an ordinance and requiring that a project proceed will fully vindi-

cate the Agins' rights. California courts have not hesitated to issue such orders in appropirate cases. *E.g., Furey* v. *City of Sacramento,* 24 Cal. 3d 862, 157 Cal. Rptr. 684, 598 P.2d 844 (1979), *cert. denied,* 100 S. Ct. 476 (1979).[26]

Second, a constitutional damage remedy would cause wholesale disruption of government resources and greatly inhibit legitimate regulation particularly, but not exclusively, in the land use area.

(a) The remedy Appellants seek would likely cause staggering financial dislocation to already overburdened government units in instances when they have not knowingly committed resources. For example, in *Horizon Adirondack Corp.* v. *State of New York,* 88 Misc.2d 619, 388 N.Y.S.2d 235 (1976), the court rejected an "inverse condemnation" claim in part because of the tremendous financial impact—over $500 million in total—which could have resulted from such a decision. Moreover, the same problems would extend well beyond the land use area. Thus, under the rule sought by Appellants, had *Andrus* v. *Allard, supra,* come out the other way presumably Congress would have purchased all the Indian artifacts in the United States containing bird feathers, surely not what Congress had in mind when it passed the Migratory Bird Treaty Act.

(b) The effect of a mandatory damage remedy will be to discourage legitimate regulation, particularly since determining in advance whether a particular regulatory scheme will be held overburdensome as

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[26] Moreover, in light of this Court's decision in *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency,* 99 S. Ct. 1171 (1979), a remedy under 42 U.S.C. § 1983 may also be available.

applied is often impossible. The Court's decisions have noted the importance of avoiding this type of impact on the other branches of government. *Compare Scheuer* v. *Rhodes*, 416 U.S. 232, 241 (1974); *Butz* v. *Economou*, 438 U.S. 478, 503, 506 (1978).

Finally, implying a damages remedy would significantly interfere with the relationship between the federal courts and the legislative branch, especially at the state and local level. *See National League of Cities* v. *Usery*, 426 U.S. 833 (1976). This Court has repeatedly held that the state's legislative declaration of the public interest is "well nigh" conclusive because state and local governmental legislative bodies are far better situated to determine the "necessity, character and degree of regulation," if any, which is appropriate in a particular circumstance. *Berman* v. *Parker*, 348 U.S. 26, 32 (1954); *Gorieb* v. *Fox*, 274 U.S. 603, 608 (1927). For that reason, this Court has deferred to the legislature on the provision of remedies, particularly where they involve major financial commitments. *Compare Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388, 396 (1971); *Dugan* v. *Rank*, 372 U.S. 609 (1963).

In the present case, Appellants seek nothing less than a court declaration that the City of Tiburon has purhased their property despite the fact that it had no intent to do so and, indeed, that the California enabling legislation under which it acted specifically precludes the City from using its zoning power to burden property unconstitutionally.

For all these reasons, the decision of the California Supreme Court should be affirmed.

ARGUMENT

I. THERE HAS BEEN NO UNCONSTITUTIONAL BURDENING OF PROPERTY IN THIS CASE

Appellants' basic claim is that since the burdensomeness of regulations is largely a factual matter, they were entitled to a trial on the merits. (Br. at 13-15.) Of course, determining whether a regulatory plan is unreasonably burdensome is often a factual question. *See Penn Central Transportation Co.* v. *City of New York, supra*, 438 U.S. at 124. But this is true in any number of areas of the law where factual questions typically predominate. *E.g., Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962) (antitrust claims). However, it has never been thought that because factual questions are important, motions to dismiss, for summary judgment, or the equivalent cannot be granted in appropriate cases. On the contrary, it has uniformly been held that such motions are appropriate where the circumstances of a particular case warrant. *E.g., First National Bank* v. *Cities Service Co.*, 391 U.S. 253, 284-89 (1968).

The problem with the argument advanced by the Appellants and the Amici who support them is that they misunderstand the posture of the case before this Court. Appellants and their supporters insist that the question here is whether a land use regulation which destroys all value and precludes any use of property is unconstitutional.[27] But while Appellants made con-

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[27] The California Court of Appeal specifically held—and the Agins did not claim otherwise in the California Supreme Court—that the Tiburon zoning served permissible police power objectives. *Agins* v. *City of Tiburon, supra*, 145 Cal. Rptr. at 477-78.

clusory allegations to this effect,[28] the California courts held, pursuant to standard California practice as described above, that those general allegations would not be credited where the statute attacked on its face shows otherwise. Instead, the California courts held that the creditable allegations, in light of judicially-noticed matters, were that the City of Tiburon enacted a zoning ordinance which would permit plaintiffs to build between one and five residential units on their property, the exact number of residential units depending upon satisfaction of other regulations with which the Agins had not attempted to comply. (App. A at 13.) (Again, the previous zoning, which is equally subject to judicial notice, had already limited the Agins to a maximum of five residential units.) The California Supreme Court held that, on the allegations as credited for demurrer purposes, the Agins did not state facts which, if true, would entitle them to a finding that the ordinance was unconstitutional as applied.

There can be no doubt that the California court's holding that there was no unconstitutional burden was correct.

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[28] *See* Complaint paragraphs IV, IX (J.A. 5, 7). These allegations—which, as discussed below, the California courts found were transparently inaccurate—were apparently included by Appellants' counsel in an attempt to overcome pleading problems under the California state decisions which had previously held that a claim for an "inverse condemnation" did not exist where diminution in value was alleged but might exist where prohibition of all use was claimed. *Compare HFH, Ltd.* v. *Superior Court of Los Angeles County,* 15 Cal.3d 508, 518, 125 Cal. Rptr. 365, 372, 542 P.2d 237, 241 (1975), *cert. denied,* 425 U.S. 904 (1976), with *Eldridge* v. *City of Palo Alto,* 57 Cal. App. 3d 613, 621, 129 Cal. Rptr. 575, 579 (1976).

A. The California Supreme Court Applied the Correct Standard

The rule has developed in this Court and elsewhere that a regulatory scheme pursuant to permissible police power objectives does not amount to a "taking"[29] unless the owner is left with no reasonable use of his property. *Andrus* v. *Allard,* 100 S. Ct. 318 (1979); *Hadacheck* v. *Sebastian,* 239 U.S. 394 (1915); *Hudson County Water Co.* v. *McCarter,* 209 U.S. 349, 355 (1908) (Holmes, J.); *Maher* v. *City of New Orleans,* 516 F.2d 1051, 1066 (5th Cir. 1975), *cert. denied,* 426 U.S. 905 (1976); *C. F. Lytle Co.* v. *Clark,* 491 F.2d 834, 838 (10th Cir. 1974); *Steel Hill Development, Inc.* v. *Town of Sanbornton,* 469 F.2d 956, 963 (1st Cir. 1972). *See also City of Eastlake* v. *Forest City Enterprises, Inc.,* 426 U.S. 668, 674 n.8 (1976) (no "taking" unless property is "render[ed] valueless").

Thus, in *Village of Euclid* v. *Ambler Realty Co.,* 272 U.S. 365, 384 (1926), this Court sustained, as a reasonable exercise of the police power not requiring compensation, a zoning ordinance which reduced plaintiff's property value by 75%. And in *Hadacheck* v. *Sebastian, supra,* 239 U.S. at 405, this Court approved a limitation, without compensation, which reduced the value of the property over 90%. "The cases are legion

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[29] As the New York Court of Appeals correctly explained:

"True, many cases have equated an invalid exercise of the zoning power, perhaps only metaphorically, with a 'taking' or 'confiscation' of property, terminology appropriate to the eminent domain power and the concomitant right to compensation when it is exercised. . . .

"The metaphor should not be confused with reality. Close examination of the cases reveals that in none of them, anymore than in the *Pennsylvania Coal* case . . . , was there an actual 'taking' under the eminent domain power, despite use of the terms 'taking' or 'confiscatory.' " *Fred F. French Investment Co.* v. *City of New York, supra,* 39 N.Y.2d at 593-94, 385 N.Y.S.2d at 388-89, 350 N.E.2d at 384-85.

that sustained zoning against claims of serious economic damage." *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 78 (1976) (Powell, J., concurring).

More recently, this Court in *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590 (1962), cited the *Hadacheck* case with approval in upholding an ordinance which precluded a quarry owner from continuing his business. The Court noted that:

> "Concededly the ordinance completely prohibits a beneficial use to which the property has previously been devoted. However, such characterization does not tell us whether or not the ordinance is unconstitutional. It is an oft-repeated truism that every regulation necessarily speaks as a prohibition. If this ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional." 369 U.S. at 592.

The principle cited here applies to cases of regulatory mechanisms which do not involve a physical invasion of property. While it may be that a "taking" can occur without "the transfer of physical control," *see Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104, 123 n.25 (1978), this Court has recently noted that "an actual physical invasion" is different for constitutional purposes from a regulatory "devaluation" of property. *Kaiser Aetna* v. *United States*, 100 S. Ct. 383, 393 (1979); *see also Andrus* v. *Allard*, 100 S.Ct. 318, 327 (1979); *Penn Central Transportation Co., supra*, 438 U.S. at 124.[30]

[30] As the First Circuit concluded in *South Terminal Corp.* v. *Environmental Protection Agency*, 504 F.2d 646 (1st Cir. 1974):

> "Three situations must be distinguished. First, a particular use of a parcel of property may be regulated or forbidden. Second, all uses of a parcel may be forbidden. Third, a right to use or burden property in a particular and permitted way may be transferred from the original owner to another person, or to a governmental body. Only the second and third situations are thought of as takings today." 504 F.2d at 679.

Appellants contend that distinctions between physical seizures or occupations of land and so-called "takings" by overregulation are "outmoded" and "anachronistic." They suggest that there are no analytical differences between the effect of a physical occupation of property by the government and regulation. (Br. at 21 n.8.) The law is quite the contrary, and with good reason:

> "The [police] power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain. . . ." *Mugler* v. *Kansas*, 123 U.S. 623, 669 (1887), quoted with approval in *Goldblatt* v. *Town of Hempstead*, *supra*, 369 U.S. at 593.

There are no similar policy considerations where government appropriates property for its own use. As a result, it has long been accepted, for example, that government occupation of even a small portion of a parcel of real property is a compensable "taking," but a regulation which may have a similar effect does not require compensation. *Compare, e.g., United States* v. *Clarke*, 48 U.S.L.W. 4258 (March 18, 1980) (construction of road over small portion of property is a "taking") with *Gorieb* v. *Fox*, 274 U.S. 603 (1927) (zoning regulation requiring a setback and thus precluding use

of a portion of property does not require compensation).

Since the present case involves claims of a "taking" by regulation, the California Supreme Court's application of the no reasonable use standard (App. A. at 13) was entirely correct.[31]

B. The Agins' Creditable Allegations, If True, Would Not Constitute a Taking

The Tiburon ordinance in question does not even come close to the limitations sustained in the foregoing cases. Thus, the California Supreme Court's conclusion that under the foregoing precedents the Agins' creditable allegations if proven would not constitute a "taking" (App. A. at 13-14) was plainly correct. A brief analysis of the factors considered in *Penn Central* emphasizes this point:

(a) *Economic impact on the owner.*[32] In this case, there is no established economic impact on the owner or even upon the owner's reasonable investment-backed expectations.[33] The zoning at the time the Agins purchased the property allowed a maximum of five residential units. City of Tiburon, Ordinance No. 9 N.S., Section 10-3. Of course, the Agins had no vested right to build even that number of units.[34] Indeed, we

[31] The California courts have generally applied this standard in regulatory "taking" cases. *See Pan Pacific Properties, Inc.* v. *County of Santa Cruz, supra; Gisler* v. *County of Madera,* 38 Cal. App. 3d 303, 112 Cal. Rptr. 919 (1974).

[32] *See* 438 U.S. at 124.

[33] As this Court has noted, expectations of future profits are in any case entitled to minimal weight. *Andrus* v. *Allard, supra,* 100 S. Ct. at 327.

[34] *See, e.g., Fleming* v. *Rhodes,* 331 U.S. 100 (1947).

do not understand the Appellants to contend that the Agins' purchase of their property somehow precluded the city from a reasonable rezoning in the public interest. And in any case the Agins' reasonable expectations could not have been that they would ultimately build or sell the property for more than five residential units.[35]

[35] Appellants do not contend that they had any reasonable expectation of being able to use the property for anything other than residential construction or to build more than the five residential units which the zoning allowed when they purchased the property. The long-standing rule in zoning cases, at least, is that where an owner purchases a piece of property with actual or constructive knowledge of particular restrictions, he is generally not in a position to attack those restrictions.

The reason for this result is plain. Where an owner purchases a piece of property knowing that it is subject to restrictions, the price he pays reflects them and allowing the owner to circumvent those restrictions would simply give him a windfall:

> "[T]hey bought land which [they] knew might be subject to restrictions and the price [they] paid should have been discounted by the possibility that restrictions would be imposed. Since [they] got exactly what [they] meant to buy, it can perhaps be said that society has effected no redistribution [*i.e.*, reduction in value] so far as [they are] concerned. . . ." *HFH, Ltd.* v. *Superior Court of Los Angeles County,* 15 Cal. 3d 508, 125 Cal. Rptr. 365, 542 P.2d 237, 246 (1975), *quoting from* F. Michelman, *Property Utility and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law,* 80 Harv. L. Rev. 1165, 1238 (1967).

Thus, the courts have repeatedly held that "a land owner cannot create his own hardship [*e.g.*, by purchasing a property with zoning restrictions] and then require that zoning regulations be changed to meet the hardship . . . because [his] own voluntary acts caused the hardship." *C. F. Lytle Co.* v. *Clark, supra,* 491 F.2d at 838.

This result makes eminent sense. For example, assume that an owner's property is worth a certain amount with its present residential zoning but would be worth twice as much with commercial zoning. Assume further that the owner sells to a buyer who pays the seller the value of the property for commercial use. If the buyer is denied commercial zoning, is there a "taking"? Of course

The rezoning of which the Agins now complain also allows a maximum of five units. (App. D at 30-33.) To be sure, the rezoning does not absolutely entitle the Agins to five units, but specifies a range of one to five units, depending upon other considerations. The Agins, however, never applied for any permit or even specifically alleged that the effect of the remaining requirements would be to preclude five units.

There is, therefore, nothing in the record or in the California Supreme Court decision to suggest that there has been any adverse economic impact on the Agins. Contrary to the Appellants' claims in this Court, the land remains zoned for residential use and the only outstanding question is how many residences may be built.

(b) *A state tribunal's reasonable conclusion that police power objectives of health, safety, morals or general welfare would be promoted by the contemplated regulation.*[36] There can be no doubt on this point. The Tiburon zoning ordinance limits the use of the Agins' property to the construction of residences. It is beyond dispute that a residential zoning ordinance is a reasonable police power objective. *E.g., Village of Euclid* v. *Ambler Realty Co., supra.* It is equally beyond dispute that one acre, five acre, and similar zoning has been uniformly upheld throughout the country. See

not, because the buyer purchased with notice and thus the result is of his own making. *See C. F. Lytle Co.* v. *Clark, supra; HFH, Ltd.* v. *Superior Court of Los Angeles County, supra.* Indeed, the result could hardly be otherwise or else any land use restriction would be inapplicable to anyone who overpaid or who acquired a property with the expectation of doing something not permitted by the regulations in place at the time of the purchase.

[36] *See* 438 U.S. at 125.

the discussion in 2 Williams, American Land Planning Law, Chapters 38-39 (1974)."[37]

(c) *Character of the governmental action.*[38] In their brief at pages 26-27, the Appellants characterize the action of the City of Tiburon as an "acquisition of a public resource." By this they seek to bring themselves into line with cases such as *Kaiser Aetna* v. *United States, supra,* and *United States* v. *Causby,* 328 U.S. 256 (1946), where the government was physically invading the private property involved. In *Kaiser Aetna,* the government attempted to require the property owner to allow public access to its private pond; in *Causby,* the United States had forcibly acquired an easement over Causby's property by flying its aircraft at low levels.

No such thing has taken place in the present case. The City of Tiburon has not turned the Agins' property into a park; it has not required public access; it has not precluded the Agins from building on the property. It has passed what is neither more nor less than a garden-variety zoning regulation of the sort which has been sustained in thousands of cases in this country, a zoning regulation under which the Agins are permitted to build between one and five residences on their property.[39]

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[37] As noted previously, the California Court of Appeals specifically held—and the Agins did not claim otherwise in the California Supreme Court—that the Tiburon zoning served permissible police power objectives. *Agins* v. *City of Tiburon, supra,* 145 Cal. Rptr. at 478 n.3.

[38] *See* 438 U.S.at 124, 128.

[39] The case of *Benenson* v. *United States,* 548 F.2d 939 (Ct. Cl. 1977), upon which the Appellants rely (Br. at 29) is typical of

The facts of the Agins' case are simple and present as dramatic a case of overreaching by a land owner as has been litigated. The Agins bought the property involved in this litigation in 1968 for $50,000. At the time of purchase, and for some time previously, the property was zoned to allow a maximum of five single family residential units. After the State of California enacted legislation requiring cities to adopt open space zoning, the City of Tiburon reexamined its land use regulations and modified the zoning to provide for a maximum of five and a minimum of one residential unit on the Agins' and other similarly situated property. The precise number of units to be allowed is conditioned upon a variety of other factors and is to be determined by the City Planning Commission and City Council upon the owner's request based upon the factors set forth in the Ordinance. The Agins never bothered to request permits to construct any residences

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the Appellants' misunderstanding of this fundamental point. In that case, the Court of Claims found that regulations imposed by the Pennsylvania Avenue Development Corporation ("PADC") Act were so burdensome as applied to the Willard Hotel in Washington that they constituted a "taking" and awarded damages under the Tucker Act. The PADC Act authorized and required the PADC to condemn properties for restoration and the PADC plan specifically pinpointed the Willard Hotel as one of the buildings to be acquired. Indeed, before the *Benenson* case was filed, the Federal District Court in litigation over the same building had already concluded that Congress had determined to acquire the Willard Hotel and that as a result injunctive relief would not be available to the property owners. *See Don't Tear It Down, Inc.* v. *Washington*, 399 F. Supp. 153 (D.D.C. 1975). Thus, the *Benenson* case was one of that limited class of cases in which the courts, including the California courts, have held that inverse condemnation is available for precondemnation activities which serve solely to depress the price at which the government intends to purchase the property involved. *See* n.44, *infra*. In this case, Tiburon is not attempting to purchase or condemn the Agins' property.

on their property, not before the zoning change and not after.

Instead, the Agins filed a lawsuit carefully failing to claim any change in the permissible use of their property but alleging that the open space zoning had deprived their property of "any purpose or use whatsoever" and that they had been damaged in the amount of $2 million, forty times the amount they paid seven years earlier. The California Supreme Court refused to credit this allegation after taking judicial notice of the ordinance and, as a result, sustained the demurrer to Appellants' complaint. As described above, based on this Court's precedents a reduction from five to one, two, three, or four permitted residential units would plainly not be a "taking." But in this case there has not necessarily been *any* reduction in the number of units which may be built on the Agins' property. The California courts' dismissal of the Agins' "taking" claim was correct. Indeed, Amici believe that now that the procedural posture of the case is clear, it is evident that the Agins raise no colorable "taking" claim and it would be appropriate to dismiss this case for want of a substantial federal question.

II. THERE IS NO DAMAGE REMEDY AVAILABLE IN THIS CASE

For the reasons discussed previously, Amici believe that there was no "taking" in the present case so that this Court need not reach the "inverse condemnation" issue. However, Amici also believe that the California Supreme Court's decision generally precluding damages as a remedy where a regulatory scheme has unduly burdened the property is correct.

As described below, there is no precedent whatever in this Court for a holding that such a remedy is constitutionally required. The California Supreme Court's decision is consistent with the decisions of most other state courts in denying a damage remedy. Furthermore, such a remedy is unnecessary, would literally threaten to bankrupt government at all levels, and would significantly hamper the effective working of the legislative branch of government. Moreover, creation of a mandatory damage remedy under which courts would effectively tell the other branches of government that they have purchased property they thought they were only regulating is contrary to separation of powers policies announced in this Court's decisions.

A. The Precedents Do Not Support an "Inverse Condemnation" Remedy

1. *There is no precedent and no foundation in this Court's precedents for such a holding.* This Court has considered the constitutionality of regulatory schemes in a number of cases in which the owner of real or personal property has contended that the regulation on its face or as applied was so onerous as to constitute a "taking." Perhaps the most famous of these cases is *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393 (1922), in which Justice Holmes in striking down a statute as an unreasonable interference with property made his famous observation that:

> "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." 260 U.S. at 415.

Appellants and their Amici claim these cases support an "inverse condemnation" remedy. They conclude that the use of the term "taking" is a recognition that an overly burdensome regulation is equivalent to an exercise of the eminent domain power for which the state simply omitted to provide compensation. Applicants argue that the courts should simply remedy this defect and enforce the regulation as an exercise of eminent domain. (Br. at 15-21.)

This argument is little more than a play on words. As has been regularly recognized,[40] the use of the term "taking" in this Court's decisions, *Pennsylvania Coal* included, is simply a shorthand for an impermissible use of the police power, not a reference to the eminent domain power. *See Fred F. French Investment Co.* v. *City of New York, supra*; 1 Nichols, Eminent Domain § 1.42(1) at 1-116, 1-121 (3d ed. 1978).

Indeed, in no case has this Court ever held that, where legislation intended only to regulate unconstitutionally overburdened property, the governmental agency involved must proceed with its regulatory plans and pay compensation. Instead, the uniform result has been to tell the agency involved that it could not proceed in the absence of compensation. Thus, the governmental unit has been required to abandon its regulatory scheme and to institute eminent domain proceedings if it chose to do so. This Court's most recent decision on this issue, *Kaiser Aetna, supra,* is highly instructive on this point.

In that case, the Army Corps of Engineers claimed that because Kaiser Aetna had dredged a channel from

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[40] See the discussion at n.29, *supra.*

its private pond to the ocean, the pond had become a part of the navigable waters of the United States and, as a result, Kaiser Aetna could no longer preclude public access to the pond. This Court held that "the government's attempt to create a public right of access to the improved pond goes so far beyond ordinary regulation or improvement for navigation as to amount to a taking under the logic of *Pennsylvania Coal Co.* v. *Mahon.*" 100 S. Ct. at 392. Having so concluded, it is noteworthy that this Court did *not* order the Corps of Engineers to make payment to Kaiser Aetna. Quite the contrary, the Court held that the government could not require public access to the pond without first bringing a separate proceeding in eminent domain and paying just compensation. 100 S. Ct. at 393.[41]

Appellants claim to have found several decisions in which this Court has "opted . . . for inverse condemnation damages as the proper remedy of owners of taken property." (Br. at 35.) In fact, the cases cited

[41] In the portion of their brief in which the Appellants argue that this Court's decisions support their "inverse condemnation" claims (Br. at 31-36), Appellants seek to distinguish a number of other cases from the present situation by pointing out that in those cases damages were not sought. The cited cases are *Goldblatt* v. *Town of Hempstead,* 369 U.S. 590 (1962); *Nectow* v. *Cambridge,* 277 U.S. 183 (1928); *Gorieb* v. *Fox,* 274 U.S. 603 (1927); *Zahn* v. *Board of Public Works,* 274 U.S. 325 (1927); *Village of Euclid* v. *Ambler Realty Co.,* 272 U.S. 365 (1926); *Hadacheck* v. *Sebastian,* 239 U.S. 394 (1915); *Welch* v. *Swasey,* 214 U.S. 91 (1909); and *Mugler* v. *Kansas,* 123 U.S. 623 (1887). While the fact that in these cases the parties had not specifically sought damages is relevant—just as it is relevant that in none of these cases did this Court imply even in passing that damages could be sought for "inverse condemnation"—these cases are surely no support for the proposition that damage awards are appropriate.

by Appellants stand for no such proposition. They are cases in which this Court held that where the United States intends to carry out a congressional program and to pay any required compensation, the Tucker Act authorizes the payment and injunctive relief is therefore not appropriate. Indeed, it is noteworthy that in each of these cases the United States argued in the Supreme Court that it was determined to carry out the plan involved and that it would pay compensation rather than have the scheme set aside. Thus, these cases actually stand for the proposition discussed below that the courts must accord to the legislative branch the right to determine whether to proceed with the plan involved and pay compensation or drop the scheme.[42]

The necessary conclusion is that a court may properly strike down a regulation which would be an in-

[42] The cases cited by Appellants are *Hurley* v. *Kincaid,* 285 U.S. 95 (1932) (Mississippi River Flood Control Act, 45 Stat. 534, which provided for construction of levees and floodways, could not be enjoined pending compensation due, if any, since the Act authorized condemnation of flowage right over Kincaid's lands; sole remedy is the Tucker Act, 28 U.S.C. § 1491); *Dugan* v. *Rank,* 372 U.S. 609 (1963), *Fresno* v. *California,* 372 U.S. 627 (1963), and *United States* v. *Gerlach Live Stock Co.,* 339 U.S. 725 (1950) (all involving the California Central Valley Project initially established by the Emergency Relief Appropriation Act of 1935, 49 Stat. 115, in which Congress specifically provided for the purchase of water rights and authorized millions of dollars for such purchase by way of appropriation; not surprisingly, the Court concluded that the Tucker Act and the Reclamation Act, 43 U.S.C. §§ 371 *et seq.*, authorized the award of compensation for any "taking" and injunctive relief would be inappropriate); *Regional Rail Reorganization Act Cases,* 419 U.S. 102 (1974) (where Congress intended to reorganize the Northeastern railroads under the Rail Act, 45 U.S.C. §§ 701 *et seq.*, the Tucker Act provides a just compensation remedy for any "taking" of property and the reorganization cannot be enjoined).

valid exercise of the police power because of its undue burden, but it may not transmogrify a police power regulation into an exercise of eminent domain when the legislative branch never intended to pay compensation.

2. *Most state courts have reached the same conclusion as the California courts.* The Appellants and their supporters attempt to portray the California Supreme Court decision in the present case as a sport, out of touch with the decisions in state courts elsewhere in the country. In fact, however, by far the majority of state courts have taken the same view as California.[43]

Among the recent state court holdings disallowing "inverse condemnation" as a general rule and holding that injunctive or declaratory orders of one type or another were the only appropriate relief in a case where a zoning or land use restriction was claimed to be unconstitutional on its face or as applied are the following:

Eck v. *City of Bismark,* 283 N.W.2d 193, 200 (N.D. 1979) (a zoning ordinance limiting plaintiff's land to agricultural uses precluded a planned residential development; the court held that "absent a land-use reg-

[43] While for the reasons set forth in this brief Amici believe the California courts are correct, there is support for the proposition that a uniform remedy is not required:

> "Remedies X and Y may each satisfy the minimum requirements of the Constitution in the degree to which they implement a Constitutional right. If so, the Constitution permits a choice." A. Hill, *Constitutional Remedies,* 69 Col. L. Rev. 1109, 1118 (1969).

See also, A. Hill, *The Bill of Rights and the Supervisory Power,* 69 Col. L. Rev. 181, 182-93 (1969); *cf. Baker* v. *Carr,* 369 U.S. 186, 236-37 (1962).

ulation exceedingly onerous on its face, actual physical conduct inconsistent with the property rights of the landowner, or governmental precondemnation regulatory activity designed to facilitate subsequent eminent-domain proceedings, an action for 'inverse condemnation' is inappropriate to challenge the validity of a zoning ordinance"); "

Gary D. Reihart, Inc. v. *Township of Carroll,* 409 A.2d 1167 (Pa. 1979) (where property owner seeks to establish land use restrictions as unreasonable, injunctive and declaratory relief are available; there is no damage remedy for the supposed "taking");

Holaway v. *City of Pipestone,* 269 N.W.2d 28, 30-31 (Minn. 1978) (a downzoning case in which the court concluded that "a writ ordering the initiation of condemnation proceedings is an inappropriate remedy to grant to a plaintiff who succeeds in establishing that a zoning ordinance has strayed beyond mere regulation. Instead, we think such an ordinance should be declared invalid and its enforcement enjoined");

Davis v. *Pima County,* 121 Ariz. 343, 590 P.2d 459, 460 (Ariz. App. 1978) (County refused to rezone property from rural to residential and the plaintiff sought both declaratory relief and damages; the court held that the "sole remedy" for an overburdensome zoning regulation was "the undoing of the wrongful legislation and not money damages");

" California also recognizes "inverse condemnation" awards for physical "takings" and attempts to depress the market price for future condemnation. *Klopping* v. *City of Whittier,* 8 Cal. 3d 39, 104 Cal. Rptr. 1, 500 P.2d 1345 (1972), cited with approval in the court below (App. A at 14); *Pan Pacific Properties, Inc.* v. *County of Santa Cruz,* 81 Cal. App.3d 244, 254, 146 Cal. Rptr. 428, 434-35 (1978).

Fred F. French Investment Co. v. *City of New York, supra* (ordinance severely restricted use of Manhattan property; the court held the regulation invalid and struck it down but specifically refused to allow a damages remedy);

Gold Run, Ltd. v. *Board of County Commissioners,* 554 P.2d 317, 318-19 (Colo. App. 1976) (County refused to rezone mountain property from agricultural to residential and the court held that declaratory relief or certiorari review were the only remedies);

Mailman Development Corp. v. *City of Hollywood,* 286 So.2d 614, 615 (Fla. App. 1973), *cert. denied,* 419 U.S. 844 (1974) (City downzoned property to reduce the number of residential units by nearly 60 percent; court held that inverse condemnation was not allowed as a remedy even if the zoning ordinance were invalid); and

Visidor Corporation v. *Borough of Cliffside Park,* 48 N.J. 214, 225 A.2d 105 (1966), *cert. denied,* 386 U.S. 972 (1967) (city regulation limiting access to tavern can be attacked in injunctive suit but damages are not available).

3. *Bivens does not suggest the appropriateness of an "inverse condemnation" remedy.* In *Bivens* v. *Six Unknown Named Agents, supra,* this Court implied a damage remedy under the Fourth Amendment. More recently in *Davis* v. *Passman,* 99 S. Ct. 2264 (1979), the Court implied a damage remedy under the Fifth Amendment for sex discrimination. As noted previously, in *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency, supra,* 99 S. Ct. at 1776, this Court left open the question as to whether there is such a

constitutional damage remedy for an overly burdensome land use regulation.

Amici believe that *Bivens* and *Passman* furnish no support for a damage remedy in the present case. Bivens had supposedly been unlawfully arrested and his house ransacked by federal agents. Davis alleged that she was fired by ex-Congressman Passman solely on the basis of her sex. Injunctive or other prospective relief was obviously of no use to either, since the damage to Bivens had all taken place and Davis could not be reinstated because Passman was no longer a Congressman. As the Court noted:

> "[T]here are available no other alternative forms of judicial relief. For Davis, as for Bivens, 'it is damages or nothing.'" *Davis* v. *Passman, supra,* 99 S. Ct. 2277.

See also Butz v. *Economou,* 438 U.S. 478, 504-05 (1978).

In the present case the gist of the claim is that Appellants have been wrongfully precluded from constructing residences on their property. If so, injunctive relief ordering Tiburon to allow the proposed construction would be a full remedy.[45]

Although they do not specifically rely on *Bivens* or *Passman,* counsel for the Agins and the Amici who support them do claim that inverse condemnation

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[45] Amici note that in those rare instances where injunctive relief is not a full remedy—as where a physical interference has occurred or where property values have purposely been depressed for later condemnation, courts—including those in California—have generally allowed inverse condemnation remedies. *See* the discussion at page 37, *supra* and n.44. The present case does not raise the issue of whether a constitutional "inverse condemnation" remedy could be implied in such instances.

should be allowed as a remedy because, at least in California, there is no other remedy available. Their briefs portray the California courts as mindlessly permitting local governments to do whatever they choose by way of land use regulation and refusing to order injunctive relief. These arguments are erroneous both as a matter of fact and logic.

The Appellants cite a series of cases which they claim show that California courts—both state and federal [46]—have upheld against invalidation regulations which Appellants and their supporting Amici insist are outrageously burdensome. (Br. at 44-51.) Indeed, Appellants claim that no land use regulation has been invalidated by the state courts in the past twenty years. (Br. at 53.) But the heart of the matter is that in the various cases Appellants cite the Cali-

[46] In their brief Appellants inconsistently argue both that the federal courts in California are as unsympathetic to their claims as the state courts, if not worse (*e.g.*, Br. at 44-45) and that the *Agins decision*, if upheld, will send litigants flocking to the federal courts (*e.g.*, Br. at 48).

Appellants' latter point is an attempt to trigger this Court's valid concern with burgeoning federal court case loads, but is entirely ill-considered in the present context. A decision of this Court on the merits of the "inverse condemnation" claim will of necessity be one of constitutional dimension. Obviously, a decision that the U.S. Constitution requires the California state courts to make a damge remedy available necessarily means that the Constitution requires the federal courts to make such a remedy available. Since the basic contention of Appellants and the Amici who support them—*see, e.g.*, the amicus briefs of San Diego Gas & Electric Co., Half Moon Bay Properties, Inc., and Messrs. Goldstein, Fadem, *et al.* (plaintiffs' condemnation lawyers on their own behalf)—is that the California state courts improperly refuse to find "takings," a decision upholding the "inverse condemnation" remedy is likely to lead to greater, not lesser, federal court case loads as plaintiffs pursue damage remedies in what they perceive to be the least unfriendly available forum.

fornia courts have found there was no "taking." If those cases are wrongly decided, the decisions should be reviewed and reversed. But the fact that California courts refuse to find "takings" where Appellants feel they should obviously furnishes no ground for the creation of an "inverse condemnation" remedy. If the California courts find there is no "taking," Appellants and their friends will have no relief whatever remedies are theoretically available.

Moreover, Appellants have their facts wrong. While Amici have not attempted a systematic survey of all California cases on land use regulation, Amici are aware of at least five cases within the past seven years in which the Supreme Court of California has struck down zoning and land use regulations as applied or otherwise ruled in favor of property owners in land use disputes. For example, in *Furey* v. *City of Sacramento, supra,* a case decided since *Agins,* a unanimous California Supreme Court held that the City of Sacramento's open space zoning was unconstitutional as applied and that, while inverse condemnation would not lie, the plaintiffs would be entitled to declaratory or injunctive relief, including in proper circumstances prohibition of the application of the zoning to their land. *See also Youngblood* v. *Board of Supervisors,* 22 Cal. App. 3d 644, 150 Cal. Rptr. 242, 586 P.2d 556 (1978); *City of Imperial* v. *McDougal,* 19 Cal.3d 505, 138 Cal. Rptr. 472, 564 P.2d 14 (1977); *San Diego Coast Regional Commission* v. *See the Sea, Ltd.,* 9 Cal. 3d 888, 109 Cal. Rptr. 377, 513 P.2d 129 (1973); *Selby Realty Co.* v. *City of San Buenaventura,* 10 Cal. 3d 110, 109 Cal. Rptr. 799, 514 P.2d 111 (1973).

Finally, Appellants contend that injunctive relief is not useful because if the courts strike down a regula-

tion, under *Selby* v. *City of San Buenaventura, supra,* the municipality may simply enact another regulation and start over. (Br. at 47.) However, the California courts have recognized that in appropriate instances injunctive relief includes not only striking down the regulation involved but ordering the agency to allow the proposed development. *See, e.g., Furey* v. *City of Sacramento, supra.*

Thus, the California courts have properly protected property rights with injunctive and similar relief. Indeed, Professor Norman Williams, whom the Appellants cite repeatedly in their brief, specifically compliments the California courts for their considered and careful handling of zoning and land use regulation matters:

> " . . . California decisions do not appear to involve a complete abdication of judicial review, as has sometimes been the case [in other states] . . . ; rather they represent a deeply ingrained but not wholly uncritical deference to municipal autonomy on such matters. . . . The California decisions have shown a great concern for the American home. . . ." 1 Williams, American Land Planning Law, § 6.03 at 116-17 (1974).[47]

Accordingly, there is no reason to apply a constitutional remedy. *See Davis* v. *Passman, supra,* 99 S. Ct. at 2276-78.[48]

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[47] Professor Williams goes on to compliment the California courts on their zoning decisions: "Generally speaking the calibre of legal reasoning is fairly high and some of it is absolutely first class." 1 Williams, *supra,* § 6.02 at 115.

[48] Moreover, it is worth noting that in *Bivens* and *Passman* the Court was specifically concerned about the absence of statutory remedies. In the present case, Appellants have not bothered to invoke any statutory remedy, but in light of this Court's decision in *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency, supra,* there is apparently a statutory remedy under 42 U.S.C. § 1983 for unconstitutional state and local land use regulations. (In *Monell* v. *Department of Social Services,* 436 U.S. 658 (1978), this Court reserved decision on the scope of any municipal immunity against an action for damages under Section 1983 for an alleged deprivation of constitutional rights. That question is now before the Court in *Owen* v. *City of Independence,* 589 F.2d 335 (8th Cir. 1978), *cert. granted,* 100 S. Ct. 42 (1979), and *Sala* v. *County of Suffolk,* 604 F.2d 207 (2d Cir. 1979). Amici express no view as to the merits of those cases.) In addition, there is apparently a remedy against unconstitutional federal land use regulations in the Tucker Act, 28 U.S.C. § 1491.

Furthermore, the financial considerations raised by the present case—*see* the discussion at pages 45-48, *infra*—were wholly absent in *Bivens* and *Passman.* Indeed, in *Bivens* the Court specifically noted that "fiscal policy" questions were not implicated. 403 U.S. at 396. Accordingly, these cases do not support the creation of a constitutional "inverse condemnation" remedy in the present case.

B. Adopting an "Inverse Condemnation" Remedy Would Cause Wholesale Dislocation of Public Resources and Preclude Effective Governmental Regulation

Over the past 50 years, this Court has regularly sustained zoning and land use regulations and has repeatedly recognized the validity of comprehensive land use planning. In the seminal case of *Village of Euclid* v. *Ambler Realty Co., supra,* this Court first sustained the constitutionality of zoning, observing:

> '[P]roblems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions,

are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive." 272 U.S. at 386-87.

This Court has repeatedly stressed the broad environmentally-related purposes for which the police power can be invoked without the payment of compensation. *Penn Central Transportation Co.* v. *City of New York, supra,* 438 U.S. at 129 ("enact[ment of] land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city" is permissible); *City of New Orleans* v. *Dukes,* 427 U.S. 297, 394 (1976) (validity of use of police power "to preserve the appearance and custom valued by the [New Orleans French] Quarter's residents and attractive to tourists" was "obvious"); *Village of Belle Terre* v. *Boraas,* 416 U.S. 1 (1974).[49]

In light of the decisions of this Court and comparable decisions in virtually every state court in the nation, a wide variety of zoning and other land use regulations have been enacted by federal,[50] state and local authorities. Thus, every state has adopted zoning enabling legislation and almost every town in the

[49] "A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one. . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." 416 U.S. at 9.

[50] Among the federal programs are National Flood Insurance Program, 42 U.S.C. §§ 4001 *et seq.*; Clean Water Act, 33 U.S.C. § 1288 (land use controls), § 1344 (wetlands controls); and Surface Mining Control & Reclamation Act, 30 U.S.C. §§ 1201 *et seq.* *See* Bosselman, Federal Land Use Regulation (1977).

United States has a zoning law of greater or lesser comprehensiveness. Anderson, American Law of Zoning, § 2.21 at 62 (2d ed. 1976); 8 McQuillen, The Law of Municipal Corporations, § 25.04 at 10 (3d ed. 1976). In addition, by 1972 many states and over 350 cities and towns had enacted non-zoning land use regulations such as flood plain control, wetland and shoreland protection regulations, and coastal zone management regulations. *See* J.A. Kusler, *Open Space Zoning: Valid Regulation or Invalid Taking,* 57 Minn. L. Rev. 1, 2 and 2 n.1 (1972). And "all 50 States and over 500 municipalities have enacted laws to encourage or require the preservation of buildings and areas of historic or aesthetic importance." *Penn Central Transportation Co.* v. *City of New York, supra,* 438 U.S. at 107.

The effect of a holding which now subjects every governmental agency that adopts or has adopted such regulations to the possibility of damages every time a court should find a particular regulation as applied oversteps constitutional bounds has staggering implications for governmental financial soundness and regulatory processes.

1. *An "inverse condemnation" remedy threatens financial disaster.* Virtually every commentator on the subject has noted the potential financial consequences that would arise from this Court's requiring an "inverse condemnation" remedy. While forcing the City of Tiburon in this case to pay $2 million it does not have and never intended to spend[51] for property it

[51] As the Agins allege in their Complaint (paragraphs V-VI, J.A. at 5-6), the bond issue they claim should have been used to purchase their property was for an amount of $1.25 million

never wanted to buy may not itself involve vast sums of money, the implications of such a decision are enormous. A few examples make the point quite clearly.

In *Horizon Adirondack Corp.* v. *State of New York,* 88 Misc.2d 619, 388 N.Y.S.2d 235 (1976), New York had established an Adirondack Park Agency to regulate some 3.6 million acres of private land in the Adirondack mountains. A land developer which owned 26,000 acres filed an "inverse condemnation" action seeking $35 million for its land on the theory that the Agency's regulations constituted a "taking." The New York court dismissed the case on the ground that "inverse condemnation" was not an appropriate remedy, noting that an award of damages under these circumstances would "have staggering implications upon the state budget and tax system . . . ." 88 Misc. at 630, 388 N.Y.S.2d at 244. Indeed, an "inverse condemnation" award could have ultimately resulted in an unexpected liability of some $500 million to the State of New York.

Significant as these implications are for state governments, they are far worse for local governments. For example, in *Encino Park Venture* v. *City of San Antonio,* Civ. No. SA 77 CA 174 (W.D. Tex. 1977)[52] landowners challenged a city ordinance which had been enacted to protect an aquifer. The plaintiffs sought injunctive relief and "inverse condemnation" damages of more than $750 million. An injunction was entered

for *all* purchases of property for open space in the City of Tiburon. Thus in the unlikely event that the Agins were ultimately awarded the $2 million they claim—as described above, that amount is 40 times what they paid for the property—they would have succeeded in forcing Tiburon to spend nearly three times its budget for open space.

[52] The decision is reproduced as Appendix D to this brief.

by the court but no damages allowed. The court observed that, were damages to be awarded, they would have exceeded the $750 million figure. Such a damage award would have bankrupted the City of San Antonio by requiring it to expend $750 million to purchase vast areas of property which the city had reasonably thought it was regulating.

These are but examples of the kind of financial disasters which lie ahead if the Appellants' point of view is accepted in this litigation. Moreover, the impact upon the public treasury would not be limited to land use regulations, broad as that financial liability might be, because there is no difference in legal effect between a "taking" by a land use regulation and by other kinds of regulations.

For example, in *Andrus* v. *Allard, supra,* the plaintiff brought suit to challenge the congressional regulatory scheme embodied in the Eagle Protection Act and Migratory Bird Treaty Act, 16 U.S.C. §§ 668 and 703 *et seq.*, and the regulations thereunder, which prohibited sale, trade, or barter of certain migratory birds and eagles, or parts thereof, even though the birds were lawfully acquired prior to the legislation. Plaintiffs, who were in the business of purchasing and selling Indian artifacts containing bird feathers, claimed that the effect of the statute was to "take" their property without just compensation. On the merits, this Court found that no "taking" had occurred and that the regulatory scheme was not constitutionally defective. However, had the Court found that the regulations constituted a "taking," under the rule proposed by the Appellants the United States government would have unintentionally and involuntarily purchased all Indian artifacts containing lawfully-obtained bird feathers, a

result which surely was the furthest thing from Congress' intention when it passed what it thought was a regulatory scheme.

As the Court is well aware, cities and towns throughout the country are hard pressed to raise enough revenue to keep their basic functions intact. See, *e.g.*, First National Bank of Boston, Economics Department, Urban Financial Stress: A Comparative Analysis of Sixty-Six U.S. Cities (1979); U.S. Congress, Joint Economic Committee, The Current Fiscal Condition of Cities: A Survey of 67 of the 75 Largest Cities (1977). To be sure, such financial concerns do not authorize cities and towns to short-cut constitutional limits on the use of regulatory power, but they certainly do make it clear that this is not the time for the Court to impose potentially tremendous financial liability on units of local government for past and future regulatory mechanisms where the governmental agencies involved had no intention, and no idea, of spending their funds for what they thought were regulatory plans.

2. *An "inverse condemnation" remedy will preclude effective government generally and land use regulation in particular.* This Court has recognized that "the public interest requires decisions and action to enforce laws for the protection of the public." *Scheuer* v. *Rhodes,* 416 U.S. 232, 241 (1974). For that reason, the Court has held on numerous occasions that judicial remedies must not inhibit "the vigorous exercise of official authority" and must take account of the "need to protect the decision making processes of an executive department." *E.g., Butz* v. *Economou,* 438 U.S. 478, 503, 506 (1978). A number of lower courts, considering the policies described in *Scheuer* and *Economou,* have noted that this reasoning applies to municipalities:

> "[I]t is clear that the threat of such [municipal damage] liability may inhibit public officials from 'mak[ing] decisions when they are needed or . . . act[ing] to implement decisions when they are made.'" *Sala* v. *County of Suffolk,* 604 F.2d 207, 211 (2d Cir. 1979).

While the cases quoted in the preceding paragraph all involved questions as to liability under damage actions brought pursuant to 42 U.S. § 1983,[53] the same policy considerations apply here.

Appellants insist that the appropriate response to the fear of excessive acquisition of property and its concomitant cost to state and local governments is for the state and local governmental agencies to exercise care in the regulation of private property. (Br. at 41-42.) However, since the courts themselves have regularly recognized that the line between a permissible regulation and an overregulation will frequently depend on the facts of a given situation, it is hardly reasonable to require state and local legislatures to guess in advance as to the possible factual permutations of a particular regulation.

Amici submit that the position urged by Appellants would simply cause government agencies to back away

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[53] In *Scheuer, Economou and Lake Country Estates, supra,* this Court, for the policy reasons described above found that under certain circumstances federal, regional and state officials were immune from personal liability in Section 1983 cases. As discussed in n.48, *supra,* the question of the scope of any municipal immunity under this section is presently pending before the Court in *Owen* v. *City of Independence, supra,* and *Sala* v. *County of Suffolk, supra.* Amici express no view as to the merits of those cases.

from needed, permissible regulations. Thus, as noted in Mr. Justice Rehnquist's concurring and dissenting opinion in *Butz* v. *Economou, supra*:

> "It simply defies logic and common experience to suggest that officials will not have this [*i.e.*, the availability of damages] in the back of their minds when considering what official course to pursue. It likewise strains credulity to suggest that this threat will only inhibit officials from taking action which they should not take in any event. It is the cases in which the grounds for action are doubtful, or in which the actor is timid, which will be affected. . . ." 438 U.S. at 526-27.

And the California Supreme Court itself noted several years before its *Agins* decision:

> "If a governmental entity and its responsible officials were held subject to a claim for inverse condemnation . . . the process of community planning would either grind to a halt, or deteriorate to publication of vacuous generalizations regarding the future use of land." *Selby Realty Co.* v. *City of San Buenaventura,* 10 Cal. 3d 110, 120, 109 Cal. Rptr. 799, 805, 514 P.2d 111, 117 (1973).

Moreover, thoughtful commentators have uniformly reached the same conclusion. For example:

> "Availability of a remedy under inverse condemnation would inhibit the exercise of the police power. The possibility of incurring significant, unanticipated liability in money damages as a result of invalidation of a zoning ordinance in an inverse condemnation action would have a chilling effect on governmental experimentation in land-use controls. This inhibition would most severely affect rapidly growing communities—those that most need innovative land-use control, yet are least able to risk incurring such liability." Note, *Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance,* 26 Stan. L. Rev. 1439, 1450 (1974).

See also to the same effect 5 Williams, American Land Planning Law, § 159.18 (1975) and § 158.09 (1979 Supp.);[54] L. Bozung, *Judicially Created Zoning Compensation: California's Brief Experiment with Inverse Condemnation,* 10 Environmental Law 67 (1979);[55] Note, *Eldridge* v. *City of Palo Alto: Aberration or New Direction in Land Use Law?,* 28 Hastings L.J. 1569 (1977).

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[54] Some of the Amici supporting Appellants have implied that Professor Williams, one of the country's acknowledged experts on land use planning law and policy, suggests that the *Agins* case was wrongly decided and that an "inverse condemnation" remedy should routinely be allowed. *E.g.,* Brief of National Association of Home Builders at 7. In fact, Professor Williams states that while there may occasionally be extraordinary circumstances under which an "inverse condemnation" remedy would be appropriate, "real dangers would be involved in a proposal [such as that made by Appellants here] to expand inverse condemnation to play a major role in the whole system." Indeed, Professor Williams noted that allowing "inverse condemnation" would make regulation "financially impossible" for a municipality and would, as a result, "break the whole scheme of land use controls." 5 Williams, American Land Planning Law, § 159.18 (1975). For that reason, Professor Williams specifically approved the reasoning of the California Supreme Court in *Agins*: "The court was clearly correct in its conclusion that any other conclusion would have severely inhibited needed public regulation." 5 Williams, American Land Planning Law, § 158.09 at 44 (1979 Supp.).

[55] "The specter of the courts looking over the shoulder of local government, scrutinizing its actions, has even greater implications for the process itself in the early formulation stages. Planning Commissions, made up most often of ordinary citizens already overly conscious of developer and landowner protests to much-needed growth control and environmental preservation restrictions, will be even more reluctant to enact innovative programs when an unwanted acquisition of a re-

C. Implying an "Inverse Condemnation" Remedy Would Interfere With the Relationship Between the Courts and the Legislative Branch

In our system of government, the primary responsibility for determining what measures will promote the public welfare lies with the legislative branch and the courts pay substantial deference to the legislative judgment. Thus, the Court long ago explained, referring specifically to land use restrictions, that:

> "State legislatures and city councils, who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character and degree of regulation which these new and perplexing conditions require and their conclusions should not be disturbed by the courts unless clearly arbitrary and unreasonable." *Gorieb* v. *Fox*, 274 U.S. 603, 608 (1927).

Thus, the state's legislative declaration of what the public interest requires is "well-nigh conclusive." *Berman* v. *Parker*, 348 U.S. 26, 32 (1954). *See also Village of Euclid* v. *Ambler Realty Co., supra*, 272 U.S. at 388; *Zahn* v. *Board of Public Works*, 274 U.S. 325, 328

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stricted parcel may be the ultimate result of their efforts. . . . It has been suggested that, on the contrary, cities and towns under the threat of an inverse condemnation action will in fact make better reasoned decisions, weighing the alternatives, examining cost/benefit analyses, and generally undertaking a more thorough investigation of the relevant issues. Such a hypothesis ignores the present realities of the planning process. . . . Professional planning departments are constantly pressured by developers and landowners for special treatment and are extremely susceptible to market forces. Their decisions are not made in an environment-community preservation vacuum and they are frequently reminded of the consequences and effects of their plans." L. Bozung, *supra*, 10 Environmental Law at 108-109.

(1927) ("[T]he settled rule of this court is that it will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining the question.") [56]

In the present case—and in all those cases like it in which federal, state, or local governments have attempted to regulate—the Appellants insist that this Court should substitute its judgment for that of the legislative branch as to whether to regulate or condemn. Of course, it is the province of this Court and the lower courts to tell legislators when their regulatory schemes have overstepped permissible bounds and unduly interfere with protected private property rights. But it has never been thought to be a proper role for a court to tell a legislature which, based on its considerations of the public welfare, has specifically decided to regulate—and not to acquire property through the use of eminent domain—that it has in fact, much to its surprise, committed resources for the purchase of the property. Such a result would be inconsistent with the cases discussed previously in which the Court has uniformly deferred to the legislative judgement as to appropriate remedy.[57]

Thus, as the Supreme Court of Pennsylvania recently pointed out in *Gary D. Reihart, Inc.* v. *Township of Carroll, supra,* in refusing to permit a damage remedy for an alleged "taking" caused by unduly restrictive land use regulations when the state legisla-

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[56] "The statement of the rule in *Zahn* remains viable today." *Moore* v. *City of East Cleveland*, 431 U.S. 494, 514 n.1 (1977) (Stevens, J., concurring).

[57] *See* the cases discussed at n.42, *supra*.

ture had provided only remedies for injunctive and declaratory relief:

> "The Municipalities Planning Code is the Legislature's mandate for the unified regulation of land use and development. The Code also sets forth procedures by which landowners and others may challenge municipal decision-making in this area. These procedures are, in the Legislature's judgment, the best means of balancing the interests of municipalities with those of land owners and others. Commentators view the Municipalities Planning Code's procedures for challenging local land regulations as a significant advance over prior methods. To permit actions for damages in disputes over local subdivision planning, as Appellant urges, would surely undermine the Legislature's established procedures for resolution of controversies involving land use and development." 409 A.2d at 1170.

The result sought by the Appellants is particularly troublesome where state and local government is concerned. For example, in *National League of Cities* v. *Usery,* 426 U.S. 833 (1976), this Court struck down a congressional attempt to control state legislative decisions regarding payment of state and local government employees because of the interference with state and local government policy decisions:

> "Quite apart from the substantial costs imposed upon the states and their political subdivisions, the Act displaces state policies regarding the manner in which they will structure delivery of those governmental services which their citizens require." 426 U.S. at 833.

Yet, this is precisely what the Appellants would have the Court do here.

This result would be particularly unreasonable in the present case since the State of California has specifically forbidden cities such as Tiburon from exercising the state-granted open space zoning ordinance power to "take" property by overregulation. Cal. Gov. Code § 65912. Thus, the California legislature has made a judgment that the zoning ordinances it has required cities to enact shall be within the permissible scope of the police power. It would be a unique step, indeed, for this Court to tell the City of Tiburon that, because its open space zoning has overstepped the permissible bounds of regulation, it has bought the Agins' property despite the specific legislative judgment not to use the eminent demain power in this instance. *Compare United States* v. *Clarke, supra,* 48 U.S.L.W. at 4260 (Congressional decision to limit acquisition power to direct condemnation suits precludes "inverse condemnation" remedy).

* * *

For all of the reasons described in this section of the brief, Amici submit that the creation of an "inverse condemnation" remedy in the circumstances of the present case would be unprecedented, unwarranted, unwise, and contrary to longstanding policy governing the relationship between the judicial and legislative branches. The California Supreme Court was correct to reject the Agins' claims in this regard.

CONCLUSION

For the foregoing reasons, Amici believe that the holding of the California Supreme Court is correct. Indeed, the holding on the "taking" issue is so clear that Amici believe it would be appropriate for this Court to dismiss the appeal for failure to raise a substantial federal question. However, in the alternative, this Court should affirm the decision of the Supreme Court of the State of California in all respects.

Respectfully submitted,

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Washington, D.C.

March, 1980

APPENDIX

APPENDIX A

The interests of Amici are as follows:

1. The Conservation Foundation is a nonprofit research and communications organization based in Washington, D.C. The Foundation's primary purposes are to improve the quality of the environment and to promote wise use of the earth's resources. Since its founding in 1948, The Conservation Foundation has worked extensively in the fields of land use planning, urban conservation, coastal resources protection and public land management.

2. The Environmental Defense Fund ("EDF") is a private, nonprofit, national membership organization with offices in Washington, D.C., New York, Denver and Berkeley, California. It has a membership of more than 45,000 persons, including scientists, educators, lawyers and other citizens dedicated to finding scientifically-sound solutions to the nation's environmental problems. EDF and its members have a keen interest in promoting environmentally sound land use management policy at all levels of government.

3. The National Audubon Society ("NAS") is a nationwide membership organization with 439 chapters and 400,000 members. NAS owns and operates the Richardson Bay Wildlife Sanctuary and Whittell Education Center in the City of Tiburon. NAS' goals include working for policies that encourage environmentally and economically sound land and water resource planning at the national, state, and local levels and promoting environmentally sensitive development and rehabilitation in our cities.

4. The National Center for Preservation Law was incorporated in 1978 under the laws of the State of New York as a nonprofit organization devoted to architectural, historic, and neighborhood conservation. The Center maintains offices in New York, Washington and San Francisco and devotes its resources to advising and providing legal

services for interested state, local and private agencies and groups with respect to conservation of historic resources.

5. The National Conference of State Historic Preservation Officers is a nonprofit organization which facilitates the administration of State and Federal programs for the preservation of America's historic, architectural and cultural heritage. The National Conference membership consists of the officially designated State Historic Preservation Officer in each of the fifty states, the District of Columbia and five territories. Among the responsibilities of these officers are the compilation of statewide surveys of historic resources; nominations of inventoried properties to the National Register of Historic Places; and the administration of the National Historic Preservation Act grants-in-aid program.

6. The National Parks and Conservation Association is a membership organization with approximately 35,000 members and contributors nationwide. The Association's main goal is the preservation and expansion of the National Park system. It is particularly concerned with the units of this system, but the Association has found that approximately two-thirds of the National Park system's units are adversely affected by incompatible land uses and activities outside their borders. The Association has concluded that in the long run one of the most promising solutions to these problems is the application of local land use laws, especially zoning, to prevent adverse uses and activities.

7. The National Trust for Historic Preservation is the leading national organization in the field of historic preservation. It was chartered by Congress in 1949 as a "charitable, educational, and nonprofit" corporation "to facilitate public participation in the preservation of sites, buildings, and objects of national significance or interest," and to preserve and administer historical properties significant in

American history and culture for the public benefit. 16 U.S.C. § 468. The National Trust has more than 160,000 contributing members, including approximately 2,000 member organizations involved in local and regional historic preservation activities. In addition to owning and maintaining historic properties, the National Trust furthers historic preservation through extensive advisory and educational services. The Trust has worked closely with many of the more than 500 municipalities which have enacted historic preservation ordinances.

8. The National Wildlife Federation is a nationwide conservation organization dedicated to the restoration, wise use and perpetuation of natural resources. Headquartered in Washington, D.C., the Federation has over 2,500,000 members and affiliate organizations in all 50 states, as well as Guam, Puerto Rico and the Virgin Islands. The Federation's membership in California is over 121,000, including the members of its affiliate, the California Natural Resources Federation. The Federation and its members and member groups, including the California Natural Resources Federation, have a long-standing interest in ensuring that zoning regulation provides for critical area protection, rational land use planning and landmarks preservation.

9. Preservation Action is a nonprofit organization located in Washington, D.C. which actively participates in the legislative process. Preservation Action encourages the protection of historic buildings and districts, the protection of neighborhoods and the promotion of neighborhood conservation.

10. The Sierra Club is a nonprofit membership organization which has been extensively involved at both local and national levels in matters pertaining to land use. The Sierra Club, through its nearly 200,000 members, has a long-standing interest in ensuring that zoning regulation be an instrument of rational land use planning sensitive to environmental concerns.

APPENDIX B

OFFICIAL RECORDS COUNTY OF MARIN

RECORDING REQUESTED BY

30216

RECORDED AT REQUEST OF TITLE INSURANCE AND TRUST COMPANY

30216 AT 50 MIN. PAST 10 A.M.

OCT 25 1968

Official Records of Marin County, Calif.

N. J. Giacomini

FEE $ 3.00 RECORDER

Donald W. Agins, D.D.S.
Bonnie G. Agins
2232 Road 20
San Pablo, Calif. 94806

BOOK 2250 PAGE 302

SPACE ABOVE THIS LINE FOR RECORDER'S USE

AP 39-172-03 AA 0-002 7761-0/2 [illegible]

Same Asabove

Transfer Tax Paid
R. I. Giacomini
Marin County Recorder

REAL PROPERTY TRANSFER TAX $ 55.00

Title Insurance and Trust Company

BY [signature] Deputy or Agent

Joint Tenancy Grant Deed

816668 m6067

FOR A VALUABLE CONSIDERATION, receipt of which is hereby acknowledged,

SAMUEL H. HOLT, a single man, ROBERT M. RAYMER, a single man, and ALLEN M. SINGER, a single man

hereby GRANT(S) to

DONALD W. AGINS and BONNIE G. AGINS, his wife , AS JOINT TENANTS,

the real property in the City of Tiburon, County of Marin, State of California, described as:

See description attached hereto, comprised of two pages

Dated: October 24th, 1968

STATE OF CALIFORNIA, CITY AND COUNTY OF SAN FRANCISCO } ss.

On October 24, 1968 before me, the undersigned, a Notary Public in and for said State, personally appeared Samuel H. Holt, Robert M. Raymer and Allen M. Singer

known to me to be the person[s] whose name[s] is/are subscribed to the within instrument and acknowledged that they executed the same.

WITNESS my hand and official seal.

[signature]

My Commission Expires January 4, 1971

Name (Typed or Printed)

[signature]
Samuel H. Holt

[signature]
Robert M. Raymer

[signature]
Allen M. Singer

NOTARY PUBLIC IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

(This area for official notarial seal)

Title Order No. 816668 Escrow or Loan No.

MAIL TAX STATEMENTS AS DIRECTED ABOVE

BOOK 2250 PAGE 302

APPENDIX C

Excerpt From City of Tiburon Ordinance No. 9 N.S., Effective September 18, 1967

Section 10-3: *"RO-1" Residential, Open Zone (one acre):*

(A) Purposes:

This zone is established in order to:

Provide for the development of single family residences in outlying areas and areas having special topographic features, and prevent a higher population density requiring a higher level of services, and damaging to the natural appearance or top-soil retention of an area;

Create conditions conducive to a desirable low density suburban environment, and protect it from the encroachment of unrelated uses affecting the continuance of such uses in existence in the area;

Provide for sufficient space to enable residents of the property to raise crops and fruit and keep small animals in a limited and controlled manner so as to be in keeping with the residential character of the area;

(B) Uses Allowed by Right:

1. One family dwelling, one guest house;

2. Providing room and board for not more than one paying guest in a single family dwelling;

(C) Land and Structure Regulations:

1. Minimum parcel area: 40,000 square feet;

2. Minimum parcel area per dwelling unit: 40,000 square feet;

3. Maximum building coverage: 15%;

4. Minimum parcel width: 70 feet;

5. Minimum yards: Front, 30 feet; Side, 20 feet; Rear, 20% of the depth of the lot or 25 feet, whichever is less;

6. Maximum building height: 30 feet; 2½ stories.

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil Action No. SA 77 CA 174

ENCINO PARK VENTURE, a Texas Partnership, et. al.

v.

CITY OF SAN ANTONIO, et. al.

TEMPORARY RESTRAINING ORDER

Filed June 18, 1977

Plaintiff's Original Complaint and Application for Preliminary and Permanent Injunctions or, alternatively, for Damages was presented to the Court on Friday, June 10, 1977. Plaintiff's Motion for an Order Granting a Hearing on Application for a Preliminary Injunction was presented to the Court on Monday, June 13, 1977. On that same day, this Court's Order Referring the Application for a Preliminary Injunction to the United States Magistrate was entered. The initial hearing on the preliminary injunction was conducted by the Hon. Joseph F. Leonard, Jr., United States Magistrate, on Thursday, June 16, 1977. All parties were represented at this initial hearing. The magistrate's Findings of Fact and Recommendations were submitted on June 17, 1977. By this Court's Order of June 13, 1977, all parties have been given five days following service of the magistrate's report in which to file written objections with the Court.

This is a suit seeking to enjoin enforcement of Ordinance No. 48106 enacted by the City Council of the City of San Antonio, Texas. The Ordinance aforesaid provides, in part, that no additional building permits shall be granted,

including permits for changing structures already installed; no additional zoning changes shall be granted; no further plat approvals shall be made; no additional construction or installation of sewer, water, gas or electrical service extensions or connections by city departments or city owned utilities shall be made. The ordinance covers all lands situated over the area designated by the Texas Water Quality Board as the Edwards Aquifer Recharge Zone, and also covers the drainage area of such lands, as well. The ordinance will become effective as of 12:01 A.M. on June 20, 1977.

The Court finds that the Plaintiffs, Encino Park Venture, et. al., will suffer immediate and irreparable harm, injury and damage if Defendants of the City of San Antonio, Bernardo Eureste, Rudy C. Ortiz, Joe Webb, Joe V. Alderete, Jr., Helen Dutmer, and Frank Wing, and their agents, servants, employees and attorneys and all persons in active concert and participation with them are not temporarily restrained and enjoined from: (1) Enforcing in any way Section Four of Ordinance No. 48106, concerning the construction and installation of all sewer, water, gas or electric service extensions or connections in the areas covered by said Ordinance; (2) enforcing Sections One, Two and Three of Ordinance No. 48106, whenever such enforcement would interfere with the obtaining of building permits, zoning changes, or plat approvals urgently and immediately needed under the terms of any contracts already effective as of the date on which this Order is entered.

The Court finds further that the Ordinance enacted by the Defendants in this cause has resulted in extensive adverse publicity for the Plaintiffs. The adverse publicity generated will irreparably injure the Plaintiffs' customer and business relationships, unless the enforcement of this Ordinance is restrained and enjoined pending a decision on the merits on the Applications for Preliminary and Permanent Injunctions. There has been testimony that

this Ordinance, if allowed to become effective, will jeopardize Plaintiffs' on-going loan and credit transactions, endangering their entire investments. Although a specific dollar amount is sought in the alternative to injunctive relief, the testimony already received clearly shows that damages may be much higher than the figure alleged [*] and, in any event, that they would be almost impossible to ascertain accurately. Loss of business opportunities if the Ordinance becomes effective would be difficult to reduce to legal damages, due to the variable market situation, the large number of those potentially affected by the Ordinance, the present uncertainty as to the length of the Moratorium, and so forth. Plaintiffs also will be irreparably injured if Defendants are not restrained from proceeding with the enforcement of this Ordinance, because this may be considered to change the relevant status quo, thereby impairing this Court's authority to consider their requests for injunctive relief on the merits.

It is therefore ORDERED, ADJUDGED and DECREED that Defendants the City of San Antonio, Bernardo Eureste, Rudy C. Ortiz, Joe Webb, Joe V. Alderete, Jr., Helen Dutmer, Frank Wing, and their agents, servants, em-

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* The paragraph of the complaint to which Judge Spears refers read as follows:

> "IX. Damages. The Plaintiffs herein alleged that in the event Ordinance No. 48106 is held to be otherwise constitutional by this Court, that, alternatively, the Plaintiffs allege that such Ordinance nevertheless constitutes a taking of Plaintiffs private property without just compensation in violation of the United States Constitution and Texas Constitution and that Plaintiffs herein allege that as a result of such taking, Plaintiffs have sustained damages to their property in the amount of at least Seven Hundred Fifty Million and No/100 Dollars ($750,000,000.00) and that the Court, after a determination of the class members and adequate notices to potential members thereof, if necessary, appoint a Master to determine the nature and extent of each class member's interest in real property affected by the Ordinance, and that thereafter, the Plaintiffs demand a jury trial for a determination of the damages due Plaintiffs and class members as compensation for the taking of their private property."

ployees and attorneys and all persons in active concert and participation with them are temporarily restrained and enjoined from: (1) Enforcing in any way Section Four of Ordinance No. 48106, concerning the construction and installation of all sewer, water, gas or electric service extensions or connections in the areas covered by said Ordinance; (2) enforcing Sections One, Two and Three of Ordinance No. 48106, whenever such enforcement would interfere with the obtaining of building permits, zoning changes, or plat approvals urgently and immediately needed under the terms of any contracts already effective as of the date on which this Order is entered.

This Temporary Restraining Order shall remain in force and in effect until June 28, 1977, unless further extended or earlier dissolved by further order of the Court; provided, that Plaintiffs shall give security in the amount of $50,000.00 for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. The Court finds that this security is adequate to protect the Defendants from any costs and damages which they may incur as a result of this Order; and it is further

ORDERED, that the court reporter of this Court shall transcribe the record of the initial hearing conducted by the magistrate on June 16, 1977, as expeditiously as possible, for the review by this Court as required by law. The Plaintiffs and Defendants herein each shall deposit one-half of the estimated cost of transcription, the total cost having been estimated to be Four Hundred Dollars ($400.00), with the clerk of this Court. Liability for the entire cost of transcription will be adjusted in the final order of this Court.

Signed and entered this 18th day of June, 1977, at 10 o'clock P.M.

/s/ ADRIAN A. SPEARS
Adrian A. Spears
United States District Judge